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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

ORIGINAL COPY

No. 79-6672

KERRY DALE CASEY, Appellant
v.
ALLEN AULT, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF CORRECTIONS, Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellant concedes that this appeal to the Supreme Court is improvidently taken and that the proper mode for a review is by petition for certiorari and requests that the papers whereon the appeal was taken be regarded and acted on as a petition for certiorari and as if presented to the Supreme Court at the time the appeal was taken, as provided by 28 U.S.C. §2103, and prays that a writ of ceritorari issue to the United States Court of Appeals for the Tenth Circuit.

In support of the petition for certiorari, the appellant states that:

1. The court below decided federal questions in a way in conflict with applicable decisions of this Court as follows:

a. The challenged instruction violated Casey's due process and equal protection rights of the Fourteenth Amendment of the Constitution of the United States. The Colorado supreme court held, in an earlier opinion, that though the issue was raised for the first time on appeal, that the challenged instruction was plain error, was highly prejudicial, and

could have had the effect of completely nullifying the consideration by the jury of the voluntary manslaughter verdict. Notwithstanding, when the earlier opinion was cited in Casey's appeal, the state supreme court refused to consider the issue of the almost identical instruction for the first time on appeal, as absent plain error, albeit that the prejudice and nullifying effect were as great or greater in Casey. In fact, in a later case, the state supreme court held that the identical instruction given in Casey "involves error which is even more grievous than the error in [the first of the three cases]."

The erroneous instruction so infected the entire trial that the resulting conviction of first degree murder violates due process. Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). The error was so prejudicial as to conflict with Casey's right to a fair trial. Chapman v. California, 386 U.S. 18, 23 (1967); Estes v. Texas, 281 U.S. 532, 543 (1965). The "highly prejudicial" instruction itself, which "could have had the effect of nullifying the consideration of the jury of the . . . manslaughter verdict", rose to the level of constitutional error. Cool v. United States, 409 U.S. 100 (1972).

Casey was denied equal protection. The federal judiciary is not bound by state rules of procedure that are unreasonable on their face or that either are unreasonably or inconsistently applied. Henry v. Mississippi, 379 U.S. 443, 448 (1965)

b. The court below erred in holding that the state was required to apply the ruling of the earlier case. Arguendo, the last of the three cases should have been applied retroactively in the circumstances here. The constitutional violation endangered the accuracy of the fact finding process and full retroactivity will be afforded. Williams v. United States, 401 U.S. 646 (1971); Henry v. Mississippi supra.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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